



Supreme Court of the United States

OCTOBER TERM, 1945

No. 484

**HELEN C. POFF, as Executrix of the Last Will and
Testament of John B. Welshans, deceased,**

Petitioner,

against

THE PENNSYLVANIA RAILROAD COMPANY,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT**

MORRIS A. WAINGER,
Counsel for Petitioner.

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<p>The decision of the Circuit Court of Appeals for the Second Circuit, interpreting and applying Section 1 of the Federal Employers' Liability Act (45 U. S. C., §51) and holding that the nearest dependent kin of a deceased employee may not recover damages for his death when nearer, but non-dependent, kin survive, raises an important question of federal law which has not been, but should be, settled by this Court.....</p>	
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ment of John B. Welshans, Deceased,**

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against

THE PENNSYLVANIA RAILROAD COMPANY,

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**PETITION FOR WRIT OF CERTIORARI TO THE
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*To the Honorable, the Chief Justice of the United States
and the Associate Justices of the Supreme Court of
the United States:*

The petitioner, Helen C. Poff, as Executrix of the Last Will and Testament of John B. Welshans, Deceased, respectfully shows to the Court:

The Opinions of the Courts Below

The opinion of the Circuit Court of Appeals has not yet been reported; it appears in full at pages 24 to 27 of the Record. The opinion of the District Court is reported in 57 Federal Supplement, at page 625, and appears in full at pages 13 to 16 of the Record.

were disqualified as beneficiaries should be disregarded and the nearest or "next" of dependent kin, who qualifies as beneficiary by reason of dependency is entitled to recover. Petitioner urged that such an interpretation of this provision of the Federal Employers' Liability Act was fully justified by the requirement that the Act "should be construed liberally to fulfill the purposes for which it was enacted" (*Jamison v. Encarnacion*, 281 U. S. 635, 640).

The Circuit Court of Appeals held that the test was: who was the next of kin, that is, the nearest relative? And it held that since the sisters and nephew were the nearest relatives and were not dependent upon the deceased, there could be no recovery for any one, and that the case lapsed for want of a qualified beneficiary, although petitioner was wholly dependent upon the deceased. It is petitioner's contention that the term "next of kin dependent upon such employee", as used in the Act, means next of dependent kin, and that under the circumstances here shown, petitioner, as the next of dependent kin, the nearest dependent relative, was entitled to recover.

Petitioner urged in the Circuit Court of Appeals that cases in which resort is had to a State law to establish relationship between a claimant and the deceased are not applicable here, because it is not necessary to determine who is "next of kin" in the sense of who is the *nearest relative who takes under the Pennsylvania intestate laws*. Petitioner concedes that if that were the only test, there are nearer relatives. However, petitioner urged that the question under the Act is: Who is the nearest dependent relative? It is conceded that petitioner is the *nearest dependent relative*. Resort is had to state law when it is necessary to determine whether the person claiming is "kin" at all or who is closer kin as between two or more relatives. As pointed out by the trial court (R. 15), this occurs, for example, in cases where the question to be determined is whether an illegitimate child is "kin" or "next of kin" of his parents or of his parents' legitimate children. That was the nature of the question which had to be determined in *Seaboard Air Line Ry. v. Kenney, Adm'r*, 240 U. S. 489.

It was held in that case that such a question is governed by state law. Petitioner urged that that does not mean that state law as to who is "kin" or "next of kin", or who is the nearest relative entitled to take a deceased's intestate estate, controls her right to recovery here. For here there is no question that the person claiming is "kin" and that she is nearest dependent "kin" or next of dependent kin. It follows that she is "next of kin dependent", as provided in the Act.

It was not disputed that had the sisters and nephew not survived, petitioner would have been entitled to recover. Their survival without a cause of action in their favor, because they were not dependent and because they suffered no pecuniary loss, is, for the purpose of the Federal Employers' Liability Act, in effect, the same as though they had not survived, and plaintiff should be permitted to recover. The Circuit Court of Appeals stated that it seems "incredible" (R. 27) that the statute should provide for a more remote dependent relative when a nearer non-dependent relative survives, because this Court has held in cases of the survival of a nearer relative who is entitled to recover only a small amount, a more distant relative of greater dependency, who would otherwise be entitled to substantial damages, cannot recover. However, this Court's decisions, which the Circuit Court of Appeals cited, proceed on the principle that when the cause of action has *vested in a qualified beneficiary capable of taking in accordance with specific provision of the statute*, the more remote relative cannot recover. This was the situation in *New Orleans & N. E. R. Co. v. Harris*, 247 U. S. 367, where the widow had lived apart from her husband but was held to have suffered pecuniary loss by his death, and therefore disqualified the more remotely related mother; in *Taylor v. Taylor*, 232 U. S. 363, where survival of a dependent widow was held to preclude recovery by the father; and in *St. Louis & S. F. R. Co. v. Scale*, 229 U. S. 156, 162, where survival of a widow prevented recovery by the parents. In each of these cases, the cause of action vested upon the death of the decedent for the benefit of a surviving relative

qualified to recover, thereby disqualifying more remote relatives. In the case at bar there was no vesting of the cause of action in a nearer qualified relative.

The Circuit Court of Appeals was in error in stating that a child independently wealthy would get "something, though little" under the Act (R. 26). The contrary follows from this Court's decision in *Gulf, Colo. & S. F. R. Co. v. McGinnis*, 228 U. S. 173, that an adult child not dependent upon the deceased parent cannot recover under the Act.

The fact that the statute is not sufficiently broad to permit recovery by a more remote dependent relative when the nearer qualified relative is entitled to recover only a small amount, or dies before the suit is instituted, which the Circuit Court of Appeals gives as a reason for its decision (R. 26), seems to petitioner to constitute no justification for extending the injustice by holding that, where the nearer relative gets and can get nothing, and when no cause of action has vested in him under the Act, the next and totally dependent kin must also be excluded and the cause of action fail.

Nor are the provisions of Lord Campbell's Act, referred to by the Circuit Court of Appeals (R. 25), decisive. For under death statutes modeled on Lord Campbell's Act the recovery is usually for the benefit of the next of kin in the proportion in which they share unbequeathed assets of the deceased, and the question of dependency is not the qualifying factor. In this respect, the provision of the Federal Employers' Liability Act under consideration here is different, because under the circumstances of this case dependency is the criterion for qualification as a beneficiary.

(b) The question is important and should be settled by this Court because decisions of highest appellate State courts, which have concurrent non-removable jurisdiction of cases under the Act, are in conflict with the decision of the Circuit Court of Appeals in this case.

The decision of the Circuit Court is in conflict with decisions of highest state appellate courts in interpreting this

section of the Act (*Notti v. Great Northern Ry. Co.*, 110 Mont. 464; *Little v. Southern Ry. Co.*, 152 So. Car. 161; 171 So. Car. 221, certiorari denied, 290 U. S. 645). Although such conflict does not constitute a conflict on a question of local law, the conflict between the decision of the Circuit Court of Appeals herein and the decisions of the state courts on this question of federal law is of importance in the enforcement of the Act by both federal courts and state courts and should be authoritatively settled by this Court to resolve the conflict, in view of the concurrent non-removable jurisdiction of state courts in cases under the statute (Federal Employers' Liability Act, §6; 45 U. S. C., §56).^{*} There are no other federal court decisions on the question presented herein.

The Supreme Court of Montana has held, in an action under the Federal Employers' Liability Act, that survival of a nearer non-dependent relative does not bar recovery by a more remote dependent relative.

Notti v. Great Northern Ry. Co., 110 Mont. 464; 104 Pac. 2d, 7.

The same principle is enunciated by *Roberts, Federal Liabilities of Carriers*, 2d Ed., vol. 2, §882, pp. 1729-1731.

The principle that where, under a death statute, dependency or pecuniary loss is essential to qualify a beneficiary, dependent relatives in a deferred class may take if those surviving in the preferred class suffer no pecuniary loss, governed the following cases under state death statutes:

Missouri, K. & T. Ry. Co. v. Canada, 130 Okla. 171; 265 Pac. 1045; 59 A. L. R. 743.

McFadden v. May, 325 Pa. 145; 189 Atl. 483.

Indianapolis & Cin. Traction Co. v. Thompson, 81 Ind. App. 498; 134 N. E. 514.

^{*}"The jurisdiction of the courts of the United States under this chapter shall be concurrent with that of the courts of the several States, and no case arising under this chapter and brought in any State court of competent jurisdiction shall be removed to any court of the United States" (45 U. S. C., §56).

The principle is also stated in *25 Corpus Juris Secundum*, p. 1112.

Support for this principle is also found in the similar principle, that whenever under a death statute a nearer relative is disqualified for other reasons than dependency, a more remote relative not so disqualified may recover, even though, had there been no disqualification of the nearer relative, the more remote one could not have recovered. This principle was followed in an action under the *Federal Employers' Liability Act* in *Lytle v. Southern Ry. Co.*, 152 So. Car. 161; 171 So. Car. 221; certiorari denied, 290 U. S. 645, where the widow was disqualified, and the mother, who was more remotely related, was allowed to recover. It was also followed in *Pries v. Ashland Lt. &c. Co.*, 143 Wis. 606; 128 N. W. 281, where the parents of the deceased, being aliens, could not recover, and the sister, more remotely related, was permitted to recover.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the United States Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals, No. 351, Helen C. Poff, as Executrix of the Last Will and Testament of John B. Welshans, plaintiff-appellee, against The Pennsylvania Railroad Company, defendant-appellant, to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States, and that the judgment herein of said Circuit Court of Appeals be reviewed by this Court, and for such further relief as to the Court may seem proper.

HELEN C. POFF, as Executrix of the
Last Will and Testament of John
B. Welshans, Deceased, Petitioner.

By MORRIS A. WAINGER,
Counsel for Petitioner.

October 3, 1945.